STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 23, 2013
v	No. 304878 Kent Circuit Court
AUGUSTUS JAMINE ROBINSON, Defendant-Appellant.	LC No. 10-002818-FC

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b). The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to 6 to 30 years in prison for each conviction. For the reasons set forth below, we affirm.

I. LATE ENDORSEMENT OF WITNESSES

Defendant argues that the trial court erred by allowing the prosecutor to call as witnesses Tom Cottrell and the victim's brother when neither was listed on the information. "A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). The prosecutor moved the trial court for the late endorsement of the two witnesses after trial began. Because of the late request, the prosecutor could not amend the witness list without leave of the court for good cause shown or by stipulation of the parties. MCL 767.40a(4).

The trial court found good cause to permit Cottrell's testimony because the prosecutor intended to call him to rebut a defense raised during defense counsel's opening argument. Both the prosecutor and the trial court were surprised by the defense raised by counsel. A trial court has good cause to permit the late endorsement of a witness to rebut a surprise defense. See *People v Kulick*, 209 Mich App 258, 265; 530 NW2d 163 (1995), remanded for reconsideration on other grounds 449 Mich 851 (1995). Accordingly, the trial court did not abuse its discretion in finding good cause for the late endorsement of Cottrell. *Yost*, 278 Mich App at 379.

The trial court also found good cause to allow the victim's brother to testify because he was available to both the prosecutor and defendant throughout the case and, therefore, should not have been a surprise to defendant. A trial court does not abuse its discretion in finding good

cause to permit a witness to testify if the opposing party is not surprised by the endorsement. See *People v Callon*, 256 Mich App 312, 326-327; 662 NW2d 501 (2003).

Were we to find error, defendant has not shown that the trial court's ruling resulted in prejudice. *Callon*, 256 Mich App at 328. Defendant does not explain how he would have responded if he received earlier notice of the prosecutor's intent to call these witnesses. Further, defense counsel refused the trial court's offer of an adjournment to speak with the witnesses and, indeed, stated that she was familiar with what the witnesses would say. In *People v Lobaito*, 133 Mich App 547, 557; 351 NW2d 233 (1984), this Court recognized that, if counsel fails to request time to interview a witness, it tends to negate a claim of prejudice. Defendant has not established prejudice and is not entitled to relief on this ground. *Callon*, 256 Mich App at 328.

II. ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel was ineffective for asking a witness for her impression of defendant's character, thereby opening the door for the prosecutor to ask the witness about defendant's unarmed robbery conviction. Because the issue is not preserved, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). We do not second-guess matters of trial strategy when assessing counsel's competence. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Here, defense counsel asked defendant's friend, Chiquita Braggs, for her opinion of defendant's character. Defense counsel successfully elicited that Braggs had no concerns about leaving her daughters alone with defendant. This fact supported defendant's theory that the victim was lying at her mother's request as revenge for defendant leaving her mother. Defense counsel chose to introduce this character evidence to support the defense, taking the risk that the prosecutor could introduce defendant's unarmed robbery conviction. Defense counsel's decision in this regard was a matter of trial strategy. *Horn*, 279 Mich App at 39. Defense counsel's representation did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Further, defendant cannot demonstrate that, but for any alleged error by counsel with respect to questioning Bragg, the outcome of trial would have been different. *Id*. The testimony about the unarmed robbery was brief, the evidence was minimally prejudicial, and the case was not a mere credibility contest between defendant and the victim.

III. STANDARD 4 BRIEF

A. SELF REPRESENTATION

In a Standard 4 brief, defendant claims that the trial court violated his right to represent himself. We review for an abuse of discretion a trial court's decision whether to allow a defendant to represent himself. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

Before a defendant may proceed in propria persona, he must first ask to represent himself, *Odom*, 276 Mich App at 419, and the request must be unequivocal, *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). Here, defendant told the trial court that he wanted to "fire" his attorney. However, defendant never requested, much less made an unequivocal request, to represent himself. Accordingly, defendant was not entitled to proceed without counsel, and the trial court did not abuse its discretion by refusing defendant the opportunity to represent himself. *Hicks*, 259 Mich App at 521.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that defense counsel was ineffective under *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), because she did not visit him in jail during the months before his trial, and was, therefore, totally absent during a critical stage of the proceedings. In *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), the Michigan Supreme Court discussed the difference between the ineffective assistance tests articulated in *Strickland*, 466 US 668, and *Cronic*, 466 US 648:

> [m]ost claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland, supra.* Under this test, counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. *Strickland, supra* at 687, 690, 694. But in *Cronic, supra* at 659-662, the United States Supreme Court identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed. One of these situations involves the complete denial of counsel, such as where the accused is denied counsel at a "critical stage" of the proceedings. *Id.* at 659. "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, [the] difference is not of degree but of kind." *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

Specifically, in *Cronic*, 466 US at 658-659, the United States Supreme Court held that:

> [t]here are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.

The Supreme Court recognized that it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 US at 659 n 25.

We recognize that the pretrial stage of a criminal proceeding is a critical stage. *People v Dixon*, 263 Mich App 393, 397; 688 NW2d 308 (2004) (adopting the ruling in *Mitchell v Mason (On Remand*), 325 F3d 732, 743 (CA 6, 2003).). Regardless, defendant fails to show that he was denied assistance of counsel during that stage. The record does not show that counsel failed to visit defendant in jail during that time. Further, the record shows some correspondence between defendant and counsel and that counsel remained engaged with the case during the pretrial stage. Accordingly, defendant has not shown he was denied the assistance of counsel during the pretrial period. *Cronic*, 466 US at 658-659.

Premised on counsel's alleged failure to visit, defendant also claims counsel did not adequately investigate the case. Again, along with an absence of record evidence that counsel failed to visit him, defendant fails to show that counsel failed to prepare for trial or explain in what ways her trial preparation was inadequate. Thus, defendant has not established the factual predicate for this claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and fails to show that his attorney's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302.

Defendant raises numerous other claims of ineffective assistance of counsel. All are unpreserved and, again, our review is limited to mistakes apparent on the record. *Rodriguez*, 251 Mich App at 38.

Defendant asserts that defense counsel was ineffective because she failed to impeach the victim and her friend with their statements to police. However, the police reports to which defendant refers are not a part of the record and, therefore, no mistake is apparent from the record. *Id*.

Defendant argues that counsel should have impeached the victim with her preliminary examination testimony. The victim testified at the preliminary examination that, during one incident, she talked on the telephone with a friend, she smoked marijuana with defendant, and then defendant performed oral sex on her. At trial, the victim testified that she smoked marijuana with defendant, *then talked on the telephone with a friend*, and then defendant performed oral sex on her. Defendant argues that counsel should have impeached the victim with her different timeline. Defense counsel successfully cross-examined the victim regarding her history of dishonesty with her mother, why the victim never tried to wake up a nearby friend during the incident in the upstairs bedroom, and why it took the victim so long to report the abuse. Because defense counsel chose to cross-examine the victim about other important issues, she may have chosen not to focus on a small discrepancy in the order of events. Defendant has failed to rebut the presumption that defense counsel's decision was a matter of trial strategy. *Horn*, 279 Mich App at 39.

Defendant claims that defense counsel was ineffective because she failed to emphasize in her closing argument an inconsistency in the testimony of the victim and her brother. At trial, the victim testified that, after defendant assaulted her in the apartment, defendant let her get up to let her brothers into the apartment. The victim's brother testified about an incident when he was locked out of the apartment for two or three minutes before *defendant* let him inside. Defendant cannot demonstrate that counsel was ineffective in failing to point out this minor discrepancy

during closing argument. "A decision concerning what evidence to highlight during closing argument" is a matter of trial strategy. *Horn*, 279 Mich App at 39.

Defendant maintains that defense counsel was ineffective because she failed to investigate whether the victim had a drug test during March or April 2009. Defendant provides no proof that defense counsel failed to investigate such a test and has failed to establish the factual predicate for this claim. *Hoag*, 460 Mich at 6.

Defendant argues that counsel should have objected when the prosecutor asked the victim's mother an open-ended question, which led to testimony that defendant was previously incarcerated. Defendant's argument that the prosecutor's question was per se objectionable solely because it called for a narrative answer is meritless. See *People v Wilson*, 119 Mich App 606, 616-617; 326 NW2d 576 (1982) (recognizing that "[t]he mode and order of interrogation of witnesses is governed by MRE 611" and that "[n]othing in the rule specifically precludes testimony because of its narrative form"). Defendant has not shown that counsel's performance fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Likewise, we reject defendant's argument that counsel should have objected to testimony elicited by the open-ended question. "[T]here are times when it is better not to object and draw attention to an improper comment." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008) (quotation omitted).

Defendant contends that defense counsel failed to investigate defendant's sister's testimony before trial, resulting in defense counsel mistakenly eliciting from her that defendant told her about an aggravated assault. There is no indication in the record that defense counsel failed to investigate the witness' testimony, and thus, defendant has failed to establish the factual predicate for this claim. *Hoag*, 460 Mich at 6. Further, defense counsel was not ineffective for failing to object to the sister's testimony. *Unger*, 278 Mich App at 242.

C. EXCLUSION OF EVIDENCE

Defendant argues that the trial court abused its discretion in excluding evidence of the reason why the victim's mother and defendant discussed sending the victim to boot camp. "A trial court's decision to admit evidence is reviewed for a clear abuse of discretion." *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

At trial, the victim testified that some time after the two incidents of abuse occurred, she overheard her mother and defendant discussing the possibility of sending her to juvenile boot camp. The victim grew angry with both her mother and defendant, and told her mother about the incidents of abuse. During cross-examination, defense counsel asked the victim if she knew "why boot camp was being discussed . . . ?" The prosecutor objected on relevance grounds, and the trial court sustained the objection. Defendant contends that, if the victim had been allowed to testify, she would have testified that she smoked marijuana in violation of her probation. We hold that this evidence was irrelevant. MRE 401.

The record reveals that defendant raised the possibility of boot camp and that the victim's mother agreed with the idea. Thus, absent the specific reason, the relevant fact at issue—the victim's motive to lie—was placed squarely before the jury. Any testimony about the alleged

reason for boot camp would not add to any additional motivation for the victim to lie about her allegations of abuse. Accordingly, although this was a close evidentiary issue, the trial court did not abuse its discretion in excluding the evidence because a decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

D. RESTRAINTS

Defendant asserts that the trial court violated his right to a fair trial because the jury saw him in restraints in the courtroom. This unpreserved claim is reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The Fifth and Fourteenth Amendments of the federal Constitution prohibit "the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005). The Michigan Supreme Court has held that freedom from shackling during trial is an important component of a fair and impartial trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Accordingly, "a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *Id*. at 425. Regardless, "a defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Horn*, 279 Mich App at 36.

We remanded this case to the trial court for an evidentiary hearing to "determine whether defendant wore restraints while the jury was present in the courtroom and, if so, whether any of the deliberating jurors saw the restraints worn by defendant-appellant." *People v Robinson*, unpublished order of the Court of Appeals, entered June 13, 2012 (Docket No. 304878).

At the evidentiary hearing, the parties agreed that defendant wore a remotely activated custody and control belt (RACC belt), which would give defendant a mild shock if he disrupted the trial. Defendant had threatened his trial counsel and it appears that the belt was necessary for defense counsel's safety. However, the trial court had not made a finding on the record that shackling was necessary to prevent injury. *Dunn*, 446 Mich at 425. Importantly however, defendant wore the belt under his shirt and both a deputy and the prosecutor testified that the belt was not visible during trial. Thus, defendant is not entitled to a new trial because he has not shown he was prejudiced because he wore a RACC belt during the trial. *Carines*, 460 Mich at 763; *Horn*, 279 Mich App at 36.

The primary issue at the evidentiary hearing was whether defendant wore handcuffs in front of the jury. Defendant testified that he wore handcuffs in front of the jury during the jury instructions, that he told defense counsel about the handcuffs, and that defense counsel briefly discussed the handcuff situation with the trial court. One of defendant's sisters, Rosa Robinson, testified that she saw defendant wearing handcuffs during jury instructions, but she also said that defense counsel did not raise the issue with the trial court. Another of defendant's sisters, Lucille Edelen, testified that after jury instructions, she saw defendant's hands clasped in front of him as he left the courtroom, causing Edelen to infer that defendant was wearing handcuffs. Edelen also said that defense counsel did not say anything to the trial court about the restraints.

Rosa and Edelen's testimony conflicted with defendant's testimony that defense counsel raised the issue of the handcuffs with the trial court. Also, Rosa's testimony conflicted with a statement in an affidavit that defense counsel raised the matter with the trial court. Moreover, despite the fact that Rosa and Edelen sat next to each other in court, their testimony differed about whether the handcuffs were visible. Defense counsel testified that she did not believe that defendant wore handcuffs during the course of the trial and did not remember bringing the issue to the trial court's attention. Further, two deputies testified that, based on the trial court's standard practices, defendant would not have been in handcuffs in front of jurors, and a deputy testified that she did not remember bringing defendant into the courtroom wearing handcuffs.

The trial court had to make a credibility determination about the conflicting witness testimony. The court ruled that the evidence did not support a finding that defendant was in handcuffs in front of the jury. If the "resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial court did not clearly err in finding that defendant was not handcuffed in front of the jury. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). Thus, defendant has not shown error, not that the court violated his constitutional rights. *Carines*, 460 Mich at 764; *Deck*, 544 US at 629; *Dunn*, 446 Mich at 425-426.

Affirmed.

/s/ William B. Murphy
/s/ Henry William Saad
/s/ Deborah A. Servitto